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No. 95-546

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,
a special purpose Wisconsin municipal corporation,

Petitioner,

v.

S.A. HEALY COMPANY,
an Ohio corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether Rule 68, FED. R. CIV. P., precludes the application of a Wisconsin statute penalizing a defendant who unreasonably refuses a settlement demand by a plaintiff in a diversity action.

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TO THE HONORABLE SUPREME COURT:

Respondent, S.A. Healy Company, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by Petitioner, Milwaukee Metropolitan Sewerage District.

Respondent is satisfied with the presentation by Petitioner of all statements except those included in

Petitioner's "Question Presented" and "Reasons for Granting the Writ" sections. Respectfully, and in accordance with Supreme Court Rule 24.2, Respondent has stated its question presented and proceeds directly to its "Reasons for Denying the Petition."

REASONS FOR DENYING THE PETITION

I.

THE DECISION BELOW FOLLOWS GOVERNING SUPREME COURT PRECEDENT ON THE APPLICABILITY OF A STATE STATUTE IN A FEDERAL DIVERSITY ACTION.

The issue presented for review by Petitioner is whether Rule 68, FED. R. CIV. P. ("Rule 68"), which by its terms addresses only *plaintiffs'* refusal of defendants' settlement offers, is sufficiently broad to preclude the application of state law regarding *defendants'* refusal of plaintiffs' settlement demands in federal diversity actions, and thus preempts the Wisconsin statute applied by the Court of Appeals below. This issue was properly resolved below based upon the rules enunciated in *Hanna v. Plumer*, 380 U.S. 460 (1965), and subsequently in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), *Burlington Northern R.R. Co. v. Woods*, 480 U.S. 1 (1987) and *Stewart Organizations, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), in which this Court confirmed and clarified the analysis to be employed in diversity actions where a state law is alleged to conflict with a federal rule of procedure. Under this Court's rulings, the determination of whether there is a conflict between a federal rule and a state law is based upon whether there exists a federal rule "sufficiently broad" to cause a "direct collision" with the state law or to control the issue before the court. *Walker*, 446 U.S. at 749-50; *Hanna*,

380 U.S. at 471-72. Thus, there is a well-defined precondition to the applicability of a federal rule in the face of an allegedly contrary state law: the federal rule, when properly construed, truly must circumscribe the disputed issue in order to preempt the state law.[1] Certiorari should be denied because the decision issued by the Seventh Circuit Court of Appeals (Chief Judge Richard Posner) properly applied the test articulated in *Hanna* and its progeny and correctly concluded that there was no conflict between Rule 68 and Wis. Stat. §807.01(3) and (4).

Petitioner requests that this Court grant certiorari based upon the argument that the Court of Appeals' decision erroneously focused upon the terms of Rule 68 rather than whether the federal rule and state law were sufficiently coextensive in purpose. Petitioner misreads both the decision below and Rule 68. Nowhere in the decision below is there application of a test contrary to that set forth by this Court, most recently in *Stewart.* Consistent with the controlling decisions of this Court, the Court of Appeals performed an exacting analysis of whether Rule 68 is sufficiently broad to govern the issue of pretrial settlement demands by plaintiffs and concluded correctly that there is no basis in the Rule or its history for the position asserted by Petitioner. Citing and following the very case Petitioner contends is ignored, *Burlington*, the Court of Appeals examined the potential conflict between Rule 68 and Wis. Stat. §807.01(3) and (4), and properly concluded that Rule 68 had nothing to say about the case before it, which involves a plaintiff's

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[1] Petitioner conceded during oral argument below that, in the absence of a "direct collision" between Federal Rule 68 and Wis. Stat. §807.01(3) and (4), the Wisconsin Statute must be applied in this diversity case.

demand of settlement rather than a defendant's settlement offer.

Petitioner further seeks review of the decision of the Court of Appeals on the ground that Wis. Stat. §807.01 (3) and (4) and Rule 68 are sufficiently coextensive so as to indicate that Rule 68 occupies the entire field of operation of Wis. Stat. §807.01. As the Court of Appeals found, this position is baseless. First, Rule 68 is narrower in scope than the Wis. Stat. §807.01 because Rule 68 only applies to offers of settlement made by defendants. There is no language of any kind in Rule 68 that even addresses a plaintiff's settlement demand. Thus, the Court of Appeals noted the lack of a direct conflict and held that the subsections of Wisconsin's offer of settlement statute involved in this case govern *demands by plaintiffs,* while Rule 68 is limited to *offers by defendants,* stating, "[t]here is no inconsistency [with Rule 68] when a plaintiff's demand rather than a defendant's offer is in issue." Petitioner's Brief App. 10a.

Second, there is no direct or unavoidable collision between Rule 68 and Wis. Stat. §807.01(3) and (4), which would serve to void or displace Rule 68 in diversity actions. In determining whether there was a direct collision between the federal rule and the state law, the Court of Appeals considered what effect the application of Wis. Stat. §807.01 would have on Rule 68. As the Court of Appeals stated, it was "[u]nable at the argument of the appeal to extract from the sewage district's lawyer *any case real or hypothetical* in which enforcing the Wisconsin rule on plaintiffs' demands would tread on the toes of Rule 68." Petitioner's Brief App. 12a (emphasis added). The Court further reasoned correctly that whether or not a plaintiff makes a settlement demand under Wis. Stat. §807.01, a defendant is free to make

his own offer under Rule 68. Petitioner's Brief App. 13a. Thus, the imposition of Wis. Stat. §807.01 did not displace Rule 68 either in purpose or effect.

To apply Rule 68 as requested by Petitioner would drastically broaden Rule 68 to entirely preempt the area of pretrial settlement, thus infringing upon the states' right to promote their own public policy goals with respect to settlement of state law disputes. Petitioner would have this Court construe Rule 68 to prohibit the state of Wisconsin from penalizing a defendant for failing to accept a settlement demand. As Rule 68 is not sufficiently broad to subsume Wis. Stat. §807.01 (3) and (4) or clearly collide with the application of Wisconsin law to the case below, Petitioner's interpretation would wrongfully encroach upon a law properly within the state's province, and would promote forum shopping by giving Wisconsin defendants "an added incentive to remove a diversity case to Federal District Court." Petitioner's Brief App. 11a.

II.

THERE IS NO ISSUE OF GENERAL IMPORTANCE WHICH WARRANTS CERTIORARI.

This case does not present a question which merits review by this Court. The standard for determining whether a federal rule or a state law is applicable in a diversity case has been enunciated by this Court many times, in *Hanna v. Plumer,* 380 U.S. 460, *Walker v. Armco Steel Corp.*, 446 U.S. 740, and more recently in *Burlington Northern R.R. Co. v. Woods*, 480 U.S. 1 and *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22. The holding below is entirely consistent with this Court's rulings, as well as those of the other circuits that have analyzed comparable disputes involving laws similar to Wis. Stat. §807.01(3) and (4).

Petitioner can point to no conflict between the decision below and any decision of this Court or another circuit court of appeals. As the Court of Appeals noted below, the circuits are consistent in their application of the appropriate test and in their holdings that the Federal Rules do not preclude the application of state laws which are similar to Wis. Stat. §807.01(3) and (4). Petitioner's Brief App. 10a-11a *citing, Tanker Management, Inc. v. Brunson,* 918 F.2d 1524 (11th Cir. 1990) (holding that Rule 68 did not preempt state law on offers of settlement since Rule 68 applies only to offers of judgment and is not applicable to settlement offers); *Fauber v. KEM Transportation & Equipment Co., Inc.,* 876 F.2d 327 (3rd. Cir. 1989) (holding that a Pennsylvania rule assessing additional damages where a plaintiff recovers more than 125% of an offer requested by the defendant does not conflict with FED. R. CIV. P. 11 or FED. R. CIV. P. 37); *Jarvis v. Johnson,* 668 F.2d 740 (3rd. Cir. 1982) (holding that a Pennsylvania settlement rule is substantive and outcome determinative, and, therefore, applicable in diversity actions).

In addition, a number of other circuits have held that similar state laws regarding offers of settlement should be applied in diversity actions. *See Armacost v. Amica Mutual Ins. Co.,* 821 F.Supp. 75 (D.R.I.), *aff'd,* 11 F.3d 267 (1st Cir. 1993) (applying Rhode Island settlement demand statute, which provides for interest to encourage settlements, in diversity action); *Camp, Dresser & McKee, Inc. v. Technical Design Assoc., Inc.,* 937 F.2d (2nd Cir. 1991) (holding that a Connecticut statute allowing a plaintiff to recover 12% interest if it recovered an amount equal to or greater than that stated in an unaccepted settlement demand applied in federal diversity cases).

Petitioner notes that sixteen states have enacted rules similar to Wis. Stat. §807.01(3) and (4) in that they attempt to encourage settlement of disputes in cases involving state law by penalizing defendants for refusing plaintiff's demands of settlement when the result in the case ultimately proves the demand to have been reasonable. Contrary to Petitioner's assertion, however, this fact does not present an issue worthy of certiorari. In the absence of any conflict between state law and a federal rule, states are free to pursue their own policy goals and to enact laws to encourage those policies. As Judge Posner noted in the Court's opinion below, the Wisconsin rule is a valid exercise of a state's right to enact laws to advance its own policies:

> States are allowed to favor plaintiffs—or defendants—who engage in activities, such as, here, making contracts for constructing sewage systems, that are governed by state law. Under *Erie*, this 'favoritism' is to operate even when the persons who have a dispute over state law find themselves in a federal court. The power of the state to jigger procedural rules to favor plaintiffs or defendants in federal diversity suits is limited by the Rules Enabling Act and the Supremacy Clause, but the Wisconsin Rule does not transgress those limits.

Petitioner's Brief App. 14a.

Finally, Petitioner requests that this Court grant certiorari because the Seventh Circuit disturbed the balance between plaintiffs and defendants purportedly intended by Rule 68, by subjecting defendants in diversity cases to Wisconsin's allegedly pro-plaintiff settlement rule. This argument was not raised below and is not properly raised

here.[2] Nevertheless, the Court of Appeals considered the argument and rejected it as unpersuasive:

> [W]e can imagine an argument that by subjecting defendants in diversity cases to Wisconsin's highly pro-plaintiff settlement rule, we would be disturbing a delicate but deliberate balance between plaintiffs and defendants that is struck in the federal rules, and hence undermining the integrity of those rules. *The argument is not made, and is anyway unpersuasive.*

Petitioner's Brief App. 14a (emphasis added). This ruling is correct. States are allowed to enact laws furthering state policies as long as they do not violate either the Rules Enabling Act or the Supremacy Clause. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). As Wis. Stat. §807.01(3) and (4) violates neither, it would be improper for a federal court, sitting in diversity, to countermand Wisconsin's right to effectuate its own policy goals of encouraging settlement.

In further support of the contention that the balance between plaintiffs and defendants has been disturbed by the ruling below, Petitioner argues that Rule 68, as drafted, protects a defendant from any state law settlement pressure.[3] It is because of this protectionist policy, Petitioner contends, that the 1983 and 1984 proposed amendments to Rule 68, allowing plaintiffs to make

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[2]This Court has stated on numerous occasions that it will usually decline to consider questions presented in a petition for certiorari that have not been considered by the lower court. *See, e.g., Youakim v. Miller*, 425 U.S. 231 (1976). Petitioner has not presented any reason to depart from this Court's normal practice.

[3]This argument was also not raised below, but was nevertheless considered and rejected by the Court of Appeals. Petitioner's Brief App. 15a.

settlement offers, were rejected. Petitioner's speculation about the basis for the rejection of proposed amendments to Rule 68 does not advance its argument. Petitioner's contention is plainly unsupported by the Rule and the corresponding advisory committee comments. Nowhere in Rule 68 or the advisory committee comments to the Rule is there any suggestion of such a rationale for the adoption of the Rule or the rejection of the proposed amendments. In fact, Petitioner's own citation reveals that the reason for the rejection of the proposed amendments was the criticism brought to bear by the civil rights bar, believing that adopting such proposals on a uniform federal basis might chill the enforcement of civil rights. 7 MOORE'S FEDERAL PRACTICE ¶ 68.-07 [5] (2d. Ed. 1995).

Another possible rationale for the rejection of the proposed amendments was that the difficult decision of whether to allow plaintiffs the opportunity to make settlement offers was thought better left to the states. As stated in the opinion below, "[t]he decision of whether to give successful plaintiffs this additional relief involves considerations of the adequacy of remedies. Committees drafting or promulgating procedural rules *might well decide to leave those considerations to other bodies to weigh.*" Petitioner's Brief App. 15a (emphasis added).

III.

PETITIONER'S NEW ARGUMENT THAT WIS. STAT. §807.01(4) CONFLICTS WITH FEDERAL POSTJUDGMENT INTEREST LAW IS WRONG AND DOES NOT WARRANT CERTIORARI.

Petitioner, for the first time, now contends that by requiring 12% interest on the amount recovered, Wis. Stat. §807.01(4) clashes with the federal statute on postjudgment interest, 28 U.S.C. §1961. This contention was not properly preserved below, and in any event, does not warrant certiorari. As recognized by the Court of Appeals below, there is no clash between Wis. Stat. §807.01(4) and the federal statute on postjudgment interest because Wis. Stat. §807.01 uses postjudgment interest only as part of the measuring rod for determining the penalty appropriate for a defendant's unreasonable refusal of a settlement demand:

> [T]he Wisconsin rule on the consequences of turning down a plaintiff's settlement demand is not a rule about the taxing of costs, or the awarding of prejudgment interest, in the usual senses of "costs" and of "prejudgment interest." The rule imposes a sanction on defendants for turning down reasonable settlement demands. "Costs" and "prejudgment interest" . . . are merely the measuring rods for determining the amount of the sanction. Wisconsin could have said to defendants that if they reject a modest settlement demand—modest because the plaintiff won a larger judgment at trial—they must pay the plaintiff $200,000 above his judgment. Then it would be plain that this additional relief was entirely separate from the judgment—that it was like an award of attorney's fees to a defendant as a sanction for filing a frivolous suit. The logic of the measuring rods actually used is transparent.

Petitioner's Brief App. 3a-4a. The use of costs and interest as the amount of money to be paid to a successful plaintiff under Wis. Stat. §807.01(3) and (4) is simply a means to apply a "penalty" to a defendant for an unreasonable failure to settle. The amounts due a plaintiff under Wis. Stat. §807.01(3) and (4) are not "judgments" subject to the federal postjudgment interest statute, and there is no "direct collision" between the Wisconsin statute and 28 U.S.C. §1961.

IV.

PETITIONER'S NEW ARGUMENT THAT WIS. STAT. §807.01 CONFLICTS WITH FED. R. CIV. P. 38 IS WRONG AND DOES NOT WARRANT CERTIORARI.

Petitioner's final new argument, not raised below, is that certiorari should be granted because "[t]he Wisconsin rule imposes a mandatory penalty during the appeal" and that "[m]andatory penalties are inconsistent with the discretionary scheme of FED. R. APP. P. 38." This argument was not raised below and makes no sense. Appellate Rule 38 deals with damages and costs for frivolous appeals and states in its entirety: "If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." Wis. Stat. §807.01 does not apply at all to the issue of penalties, mandatory or discretionary, during appeals. Petitioner has misread Appellate Rule 38, and this argument has no relevance to Wis. Stat. §807.01.

CONCLUSION

Certiorari is not warranted. The Court of Appeals correctly applied the governing precedent of this Court and correctly held that there is no conflict between Rule 68, FED. R. CIV. P., and Wis. Stat. §807.01(3) and (4). For the foregoing reasons and in accordance with the above cited authority, Respondent respectfully submits that certiorari should be denied to Petitioner and the decision of the United States Court of Appeals for the Seventh Circuit allowed to stand.

Respectfully submitted,

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